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No. 95-83

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Alan Meghrig
and Margaret Meghrig,
Petitioners

vs.

KFC Western, Inc.,
Respondent

AMICUS CURIAE BRIEF OF SOUTHERN CALIFORNIA SERVICE STATION ASSOCIATION IN SUPPORT OF PETITIONERS

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36 pp

QUESTIONS PRESENTED

1. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which authorizes district courts to restrain persons who have contributed to contamination or to 'order such persons to take such other action as may be necessary", also authorizes a private party suit for reimbursement of clean up costs, despite the absence in RCRA, unlike CERCLA and other statutes, of any express language authorizing such an action.

2. Whether the citizen suit provision of RCRA, 42 U.S.C. 6972 (a)(1)(B), which only permits suits against persons who have contributed to the generation, transport or disposal of solid or hazardous waste "which may present an imminent and substantial endangerment to health or the environment" authorizes a citizen suit for contamination that was fully remediated at least 3 years before the action was commenced.

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STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case as shall be set forth in Petitioner's brief on the merits.

INTR^DUCTION AND INTEREST OF AMICUS

Amicus, the Southern California Service Station Dealers Association, represents the interests of gasoline retailers throughout the region, a region which is the largest single petroleum market in the world.

The activities of the gasoline retailers represented by the Association have been extensively regulated by the Resource Conservation and Recovery Act (RCRA) since 1984 Amendments thereto became effective.

The interpretation of RCRA, particularly with respect to underground storage tanks, is of tremendous concern to the Association.

If the interpretation of the 9th Circuit is upheld, the practical impact on our members would go far beyond the legal implications.

In particular, if upheld, the ruling would hurt our members ability to obtain investment capital, and would substantially drive up our costs of dealing with the RCRA regulated substances that are at the heart of the daily operation of a modern service station.

Moreover, if upheld, the ruling would effectively repeal EPA's newly promulgated underground tank lender liability rule. 60 Fed. Regis. 46692 (Sept. 7, 1995).

EPA explained the need for the rule:

" Until now, EPA believes that concerns over environmental liability have made a significant number of lenders reluctant to make loans to otherwise credit-worthy owners and operators of UST's. The free flow of credit to UST owners (many of whom are small entities and that may rely on secured financing mechanisms for capital){such as our

members},is expected to assist UST owners and operators in meeting their obligations to upgrade, maintain, or otherwise comply with RCRA Subtitle I and other environmental requirements.

Conversely, the lack of such capital may adversely affect the ability of an UST owner to meet its obligations under subtitle I **with concomitant adverse environmental impacts from UST's and UST systems, that are out of compliance due to the lack of financing to make the necessary improvements.** 60 Fed. Regis. at 46692, 46693.

It is extremely important that the Court be aware that the major reason EPA believes the tank lender liability rule will withstand scrutiny is the absence of a private damage action under RCRA subtitle I; whereas a similar rule under CERCLA was struck down by in Kelley, et.al. v. EPA, 15 F.3rd 1100 (D.C.Cir. 1994).

EPA explains:

" The Court held that "EPA lacked statutory authority to restrict by regulation private rights of action under the statute.... **Whereas CERCLA contains a provision regarding private rights of action, there is no explicit**

provision for private rights of action contained under RCRA Subtitle I. " 60 Fed. Regis. at 46699.

This ruling reverses that well settled principal, a principal that has been relied upon by both regulators and the regulated community.

The importance of the rule to our members, a rule put in jeopardy by the 9th Circuit ruling, compels us to seek reversal.

A review of the history of regulation of underground storage tanks, shows why creation of this new federal cause of action by the 9th Circuit is particularly inappropriate.

Prior to 1983, gasoline underground storage tanks were largely out of sight and out of mind.

Those instances where leakage had occurred were dealt with under state law, under a variety of theories, ranging from

strict liability, See, e.g., Yommer v. McKenzie, 255 Md. 220, 257 A.2d 138 (Md. 1969), to trespass and nuisance.

A series of highly publicized leaks, in particular, one at Canob Park, Rhode Island, that ended up on the TV show "60 Minutes", spurred calls for Congressional action.

Members of Congress were told by the EPA that it lacked authority under existing statutes to remediate leaking underground storage tanks ("LUSTS").

In particular, Superfund (CERCLA) could not be used, because gasoline falls within the "petroleum exclusion" found at 42 U.S.C. 9601 (14). See generally, Wilshire Westwood Associates v. Atlantic Richfield Co., 881 F.2d 801 (9th Cir. 1991).

As a result, two bills amending CERCLA were introduced in that 98th Congress, H.R.

4761 by Rep. Ritter, and S. 2513 by Sen. Durenberger, that shared two common objectives:

(1) to repeal the petroleum exclusion and allow Superfund authority to be used in leaking tank cases and (2) to authorize EPA to establish regulations for UST's.

Amicus, represented by Counsel of Record, and our national organization, the Service Station Dealers of America, were key players in the ensuing legislative debate.

The industry viewed repeal of the petroleum exclusion as a costly disaster in the making. If gas stations were hung with the "Superfund Site" label, investment capital and liability insurance would disappear, and the cost of handling our products would substantially increase.

On the other hand, regulation of tanks

was viewed as a sensible step.

As a result, a consensus was reached which enabled a regulatory program to be established under Subtitle I of RCRA created by the 1984 Amendments. See generally, House Report 98-1133, 98th Cong., 2nd Sess. (1984).

Nevertheless, a Congressman or Senator with a tank leak in his or her district still could not call EPA and request a federal response to a tank leak.

The next Congress saw proposals to partially lift the CERCLA petroleum exclusion, 42 U.S.C. 9601(14), by defining releases from petroleum underground tanks as hazardous substances. See, e.g., Section 101 of HR 2560 (99th Cong. 1st Session)(authored by Chairman Florio).

Once again, these proposals to repeal or modify the petroleum exclusion, and thus

subject gasoline UST cases to CERCLA, authority did not survive.

It is instructive to note that had any of these proposals passed, then a federal cause of action for cost recovery in petroleum UST cases would exist under CERCLA.

The fact that they did not pass shows that the 9th Circuit ruling lacks merit.

Congress chose a different path.

Under Section 205 of the 1986 Superfund Amendments and Reauthorization Act (SARA) a comprehensive financial responsibility scheme was established, along with creation of the federal leaking underground storage tank trust fund. See, 42 U.S.C. 6991b.

Although a Superfund bill was used as the vehicle, the fund was created under RCRA, primarily because of the desire to keep underground gasoline storage tanks out of the

ineffective quagmire that Superfund had turned into. See generally, House Report # 99-962, (99th Cong. 2d Session) (The Conference Report on SARA).

The net result of the legislative debate was to create a comprehensive regulatory scheme, See 60 Fed. Regis. 46693- 46694, and 40 CFR 280, 281, that EPA was authorized to, and in fact has, "franchised" to the states under 42 U.S.C. 6991c.

For purposes of this case, the key provisions are those dealing with corrective action, financial responsibility, and the federal and state funds.

EPA's financial responsibility regulations (40 CFR part 280 subpart H) require UST owners and operators to maintain an annual aggregate of "financial assurance" of 1 million to 2 million dollars.

The method of demonstrating financial assurance most relied upon nationwide is the 42 state tank trust funds.

California has a tank fund set up on the authority of the Section 25299.10 of the Health and Safety Code.

That fund, like others, was set up because of the unavailability of insurance, See, Cal. Health & Safety Code, 25299.10 (b)(4), and provides reimbursement of clean up costs and other costs to eligible claimants.

It was also designed so that California could obtain its "tank franchise" from EPA, and was enacted to further:

" the interest of the people of the state in order to avoid <u>direct federal regulation</u>, of persons already subject to state law...Cal. Health & Safety Code 25299.10 (b)(10).

Congress did not create an implied federal cause of action for cost recovery in UST cases; it left the issue to state law.

ARGUMENT

As a threshold matter, SCSSA believes the time has come for the Court to refine the analysis under Cort v. Ash, 422 U.S. 66 (1975), as to when an implied cause of action is available under a federal statute.

Specifically, we believe that where the statute does not expressly provide for the cause of action or relief sought, there must exist a clearly articulated and affirmatively expressed intent in the legislative history that creates an unmistakable implication that Congress intended to create such a cause of action.

If this threshold inquiry is not met, then federal courts should not be required to engage in the analysis under the other three factors enunciated in Cort.

As demonstrated, infra, this test cannot

be met, therefore then decision below should be reversed on this basis alone.

I. THE 9th CIRCUIT DECISION IS BASED UPON ERRONEOUS ASSUMPTIONS

The basis of the 9th Circuit decision is an assumption that to rule against an implied right of action for contribution under RCRA would leave the plaintiffs without a remedy, and thus would be "bad public policy".

The fact is that state law has always provided the remedies for our members, who have more experience with petroleum contaminated properties than anyone else.

As noted, supra, due to the requirements of RCRA that underground tank owners and operators be able to demonstrate financial responsibility, See, 40 CFR Pa t 280 Subpart H, and the unavailability of underground tank insurance for small businesses such as those operated by our members, California and 41

other states have created underground tank clean up funds.

These funds are designed to reimburse petroleum tank clean up costs such as those at issue in this case.

In the cases of orphan tank leaks, where no responsible owner or operator can be found, States and EPA may turn to the federal leaking underground storage tank (LUST) trust fund.

Neither service station dealers, who pay the tax that finances the fund, nor any other private party, are allowed to tap into the federal fund for reimbursement, as the plain language of the statute limits cost recovery to "costs incurred by the Administrator or by a State" . 42 U.S.C. 6991b (6)(a).

The reimbursement issue has quite properly been handled by the states, and claims for reimbursement have been, and

continue to be made to state tank funds in California and 41 other states.

In addition, the full range of legal remedies under state law will continue to be available to our members, who buy more contaminated property than anyone else, as well as to others.

What the 9th Circuit majority saw as bad public policy, was in fact a carefully crafted legislative response, that has created an award winning program and a model federal - state partnership.

In this case, the bad public policy would come about through legislating from the bench, based upon the erroneous assumption that the Respondent, or similarly situated persons would be left without a remedy.

The second erroneous assumption made by the 9th Circuit majority is that the same

remedies available to the EPA Administrator should also be available in a citizen suit. KFC Western v. Meghrig, 49 F.3rd 516, at 521-522.(9th Cir. 1995).

In Furrer v. Brown, 62 F.3rd 1092 (8th Cir. 1995), the 8th Circuit aptly described this argument as a non sequitur. Id. at 1100.

As we have seen, cost recovery from the federal LUST trust fund is limited to costs incurred by "the Administrator or by a State" 42 U.S.C. 6991b (6)(a). The available remedies to the Administrator and a private party are not the same, thus, the 9th Circuit's assumption is contradicted by the plain language of the statute.

II. THE PLAIN LANGUAGE OF THE STATUTE DOES NOT AUTHORIZE THE CAUSE OF ACTION CREATED BY THE 9th CIRCUIT

In pertinent part, 42 U.S.C. 6972(a)(1)(B) allows any person to

maintain a civil suit :

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present to the past or present handling, storage, treatment or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...

The district court shall have jurisdiction to ... enforce permits and other requirements, to restrain any person who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste...
to order such person to take such other action as may be necessary, or both..."

The 9th Circuit majority attempted to support its holding by relying on the term " order such person to take such other action as may be necessary " with respect to regulated substances that pose an imminent and substantial endangerment to health or the environment.

We believe the key is the term "necessary".

SCSSA fails to see how it is "necessary" to award cost recovery or damages under **federal** law in order to have a potentially responsible party abate an imminent and substantial endangerment.

In its analysis of the Cort v. Ash factors in Furrer, the 8th Circuit noted that a persuasive argument can be made that the Furrers, (as well as respondent KFC Western herein), are in a class of persons that the statute is directed against - owners of a storage facility where petroleum products or hazardous waste presents an imminent and substantial endangerment. 62 F.3rd at 1092.

The key point is that the "carrot" of a potential damage award under RCRA is not what would motivate a service station operator or owner of a leaking tank to take action; rather it is the "stick" of "corrective action"

mandated by 42 U.S.C. 6991b(h)(2) et. seq.

The "stick" is provided by the threat of heavy fines and even criminal prosecution in some cases under state (See, e.g. Cal. Health and Safety Code Sec. 25299) or federal law if the corrective action is not taken.

Thus, to characterize potential damage awards made by federal courts under RCRA as "action necessary" defies logic and common sense.

Additionally, to the extent that "carrots" are relevant at all, those carrots exist in the form of the ability of owners and operators who have complied with applicable UST regulations to seek reimbursement under <u>state</u> funds.

The fact that a private party has no right to tap into the <u>federal</u> UST Trust Fund is telling evidence of two facts:

(1) that the federal cause of action implied by the 9th Circuit was expressly rejected by Congress and (2) that an implied federal cost recovery cause of action can not be justified on the basis that it is "action necessary" to ensure that parties undertake the abatement of imminent and substantial hazards to human health or the environment.

Simply put, if Congress had intended to allow the relief sought, it would have done so in the plain language of the statute.

Congress refused to repeal or modify the CERCLA petroleum exclusion, and also did not allow private parties to tap into the federal underground tank trust fund.

Moreover, if the cause of action created by the 9th Circuit had in fact been created by Congress, either expressly or implicitly, in the 1984 RCRA Amendments at issue here, then

there would have been no need to attempt to repeal or modify the petroleum exclusion, or to open up the federal UST fund to private party cost recovery during the 1986 Superfund Amendments debate.

This fact lends further support to view taken by the 8th Circuit in Furrer; and clearly demonstrates that the opinion below must be reversed.

III. THE LEGISLATIVE HISTORY DOES NOT SUPPORT CREATION OF AN IMPLIED CAUSE OF ACTION

RCRA has contained a citizen suit provision dating back to its original enactment in 1976.

According to the discussion of the original citizen suit provision found in Senate Report 94-988, 94th Cong. Second Session at p.18:

" The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act

Amendments of 1972.

The bill provides for citizen participation in the enforcement of requirements and regulations established under this Act.

This provision is carefully restricted to actions where violations of standards or regulations or a failure on the part of officials to perform mandated action is alleged.

Time is provided between notice and filing of the action to give the State or the Administrator an opportunity to act on the alleged violation."

We believe two points are critical here.

First, from its inception, the RCRA citizen suit provision has been "carefully restricted".

Those "careful restrictions" have never been removed by Congress, despite efforts to do so.

Even a cursory review of the Conference Report to the 1984 Amendments reveals that :

" The Senate Amendment contains a similar provision, limiting citizens' right of action ...
CONFERENCE SUBSTITUTE.- The Conference Substitute adopts the Senate Amendment with

<u>additional limitations</u> on citizens' right of action ..."
House Report # 98-1133 (98th Cong. 2d Session, 1984).

If Congress has removed these "careful restrictions" and "additional limitations", then the source of that removal is absent from the legislative history.

Given the detailed list of restrictions spelled out in the Conference Report, (and the statute itself), it stands to reason that such restrictions would appear in the important areas of what costs are recoverable, and the statute of limitations.

The 9th Circuit opinion gives us no guidance as to what costs would be recoverable, rather it would require an ad hoc determination of whether the costs incurred are, or were, "action necessary".

By contrast, under CERCLA, where the right of private parties to seek reimbursement

for clean up costs incurred is expressly provided for in the statute, the only costs recoverable are those that are :

"necessary costs of response incurred by any other person consistent with the National Contingency Plan." 42 U.S.C. 9607(a)(2)(B).

A second area where the 9th Circuit would throw "careful restrictions" out the window is with respect to the statute of limitations.

CERCLA provides a remarkably detailed statute of limitations for cost recovery actions. 42 U.S.C. 9613 (g)(2).

RCRA's silence on this point, both in the statute, as well as in the legislative history, is deafening.

If Congress' intended to create a private right of action for cost recovery or damages under "carefully restricted" citizen suit provision of RCRA, it would have spelled out what costs are recoverable, and when an action

to recover such costs must be filed.

At a minimum, we should be able to find legislative history that clearly articulates and affirmatively expresses what costs are recoverable, what standard is used in conducting judicial review of such cost recovery actions; and what statute of limitations is to be applied.

Such history is conspicuous by its absence, thus it is entirely inappropriate to "unlimit" the carefully restricted RCRA citizen suit provision.

The second point made clear by the legislative history is that the result in this case is virtually dictated by the decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 17 (1981).

As discussed, supra, the history makes

clear that the RCRA citizen suit provision is based upon the comparable provision of the Clean Air Act.

In Sea Clammers, 453 U.S. 1, (1981), the Court noted that the citizen suit provision of Clean Air Act of 1970:

" **makes no provision for damages to the individual**" 453 U.S. at 17, citing 116 Cong. Record 33104 (Statement of Senator Hart).

It should be noted that the legislative history does reveal an effort in the House to undercut the holding of Sea Clammers and also that of Milwaukee v. Illinois (II), 451 U.S. 304 (1981), with respect to the issue of whether actions may be brought under RCRA pursuant to supplementary authority to the express language of the statute inferred by "federal common law". See, House Report 98-198, Part 3, at p.20 (Judiciary Committee).

The provision was dropped in Conference,

as evidenced by the following:

" I note with satisfaction the decision of the Conference Committee to reject the House Amendment entitled " Preservation of Other Rights " ;

This innocuous sounding amendment was intended to convey the message to the federal judiciary that there is a " federal common law " applicable to hazardous waste.

As a result of the decisions in the City of Milwaukee and National Sea Clammers cases, it is clear beyond dispute that there cannot be any "federal common law" in an area covered by a comprehensive Federal statute such as the Solid Waste Disposal Act.....

The ironic thing is that there is hardly any area in which the ad hoc creation of remedies by individual judges is less necessary."
(Cong. Rec. Oct. 5, 1984 pp. S13812, 13813; (remarks of Sen. Simpson).

Whether it is viewed as an implied cause of action, or an attempt to revive the notion that "federal common law" can create this cause of action, the fact is that Congress affirmatively rejected attempts on several fronts to create the ad hoc remedy conjured up by the 9th Circuit majority.

The ruling sought by the Respondents

would revolutionize the rules of the game that those of us who making our living in the petroleum marketing industry have lived with for over a decade.

In conclusion, the legislative history is utterly devoid of the a clearly articulated and affirmatively expressed intent to create the cause of action relied upon by the Respondent, therefore the opinion below must be reversed.

IV. IF SUCH A CAUSE OF ACTION EXISTS IT IS LIMITED TO CASES PRESENTING AN "IMMINENT AND SUBSTANTIAL ENDANGERMENT"

The plain language of the citizen suit provision allows a person to bring an action:

" on his own behalf against any past or present generator, transporter or past or present operator of a treatment, storage or disposal facility who has contributed or is contributing to the past or present handling, storage, treatment or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...
42 U.S.C. 6972(a)(1)(B).

The key is the plain meaning of the term "imminent".

There is simply no imminent endangerment where the site has question has been cleaned up three years prior to the action being brought.

Thus, even if a cause of action for cost recovery or damages can be implied, it cannot be applied under the facts of this case.

The endangerment in this case is neither "imminent" nor is it ongoing, rather damages are sought for actions of the past.

The opinion in effect rewrites the statute by adding the term "may have" to the existing law, which addresses only situations

> : which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. 6972(a)(1)(B).

Congress could just as easily added the

term "may have" and thus applied RCRA to past endangerments, as it defined potentially responsible parties as those of the "past or present" whose actions may be causing an imminent endangerment.

The plain language of the statute is clearly dispositive on this point.

In Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), the Court held that under the Federal Water Pollution Act, no action should lie where a citizens suit is based upon violations that occurred entirely in the past. Gwaltney further shows that no cause of action should lie in the case at bar.

CONCLUSION

Congress never intended to create a private right of action for cost recovery or damages under RCRA generally, or under the

underground tank program created by Subtitle I of RCRA specifically.

The practical effect of the 9th Circuit's ruling is enormous. Congress was aware of those effects and rejected efforts to expressly provide the cause of action that the 9th Circuit has implied.

The opinion under review amounts to judicial repeal of a carefully crafted legislative framework that has worked well.

SCSSA therefore must urge the Court to reverse the decision of the 9th Circuit.

Respectfully submitted,

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